

SECRETFILE **OGC** Has Reviewed

DD/S 70-0620

12 FEB 1970

MEMORANDUM FOR: Chairman, CIA Travel Policy Committee**SUBJECT : Use of Private Aircraft on Official Business****REFERENCE : Memo dtd 5 Feb 70 for Admin Officer/ORD,
fr Assistant General Counsel, subj:
Transport of Non-Government Personnel in
Private Aircraft while on Government Business**

1. The Office of General Counsel has suggested that the Deputy Director for Support consider the advisability of establishing official policy or restrictions governing the use of private aircraft while travelling on official business.

2. It is requested that the Travel Policy Committee evaluate the need for such policy or restrictions and develop appropriate recommendations to the Deputy Director for Support.

61
[Redacted]
Support Operations Staff/DDS

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Attachments:

1. Reference (as stated)
2. Memo dtd 4 Aug 67 (OGC 67-1532)
for Compt., OSA, fr OGC, Subj:
U.S. Gov't Liability for Acts of
Contract Employee While Using His
Privately Owned Airplane

Distribution:

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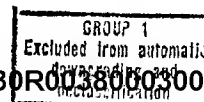
OGC 70-0201

5 February 1970

MEMORANDUM FOR: Administrative Officer/ORD

SUBJECT: Transport of Non-Government Personnel
in Private Aircraft while on Government
Business

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1. [] has asked if the Agency has any objection to, or restrictions on, the transport of contractor personnel in his private aircraft while he is on official travel. No official policy or restrictions now govern this situation but the potential legal liability of the Government in the event of an accident is serious enough to warrant a policy position. A copy of this memorandum is being forwarded to the Deputy Director for Support for his consideration.
 2. As a matter of law, if an accident resulting from the negligence of the pilot-employee should occur during authorized official travel and result in death or injury to third persons, the Government could be subject to suit under the Federal Tort Claims Act. The question of the Government's liability for acts of an employee while using his privately-owned airplane was discussed in a memorandum from this office to the Comptroller/OSA, dated 4 August 1967 (OGC 67-1532). The law as stated in that memorandum is generally applicable here although that question did not involve liability to contractor personnel riding as passengers nor to other third parties.
 3. Assuming that the employee has been authorized to use his private aircraft for travel on official Government business and an accident occurs because of the employee's negligence, it would be deemed to have occurred within the scope of his employment. The contractor personnel riding in the aircraft would probably be considered as guests and their right of recovery would depend upon the guest statute of the state in which the accident occurred. The fact that they are contractor personnel flying to a site on which they are conducting work for the Agency would not necessarily change their position as guests as a matter of law.



4. A more serious problem inherent in the use of privately-owned aircraft for official business is the possibility of an accident involving third parties and resulting in extremely high damages, such as a collision with a commercial aircraft carrying a large number of passengers. There too the Tort Claims Act would permit an action for damages against the Government. No consideration is given here to the possible death or injury to the pilot-employee since he would be covered by the Federal Employees' Compensation Act.

5. It is impossible to state definitively the odds of the Government being sued or incurring a judgment for damages since there are a myriad of possible factual situations, and the applicable law would depend upon the state where the accident occurred. However, William Nelson of the Tort Claims Section, Civil Division, Department of Justice, is of the opinion that the risks are as set forth above.



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Assistant General Counsel

cc: DDS (w/att)

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OGC 67-1532

4 August 1967

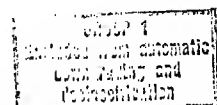
MEMORANDUM FOR: Comptroller, OSA

SUBJECT: U. S. Government Liability for Acts of
Contract Employee While Using His
Privately Owned Airplane

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1. You have requested the advice of this office as to possible U. S. Government liability for the acts of a contract employee while using his privately owned airplane in going to and from his posts of work, and between such posts. The facts are as follows: The contract employee [redacted] resides with his family in city X. He travels from his home in X to either Post A or Post B where he actually performs his work. He also travels between Posts A and B. Post A is located in another state, approximately 250 miles distance from X, and U. S. Government air transportation is available. Post B is located in the same state as X, approximately 175 miles distance from X, and U. S. Government air transportation is not available. Post B is separated from Post A by approximately 300 miles with Government air transportation available. The subject contract employee has been utilizing the Government air transportation available but future demands indicate he will be required more and more at Post B. To drive an automobile from X to Post B would take over three hours whereas by plane the time is reduced to twenty minutes. Travel by plane would permit the employee to return to his home the same day. Primarily for the above reasons, the employee has requested permission to use his privately owned airplane for all transportation needs to, from and between both posts. The Agency would reimburse him the constructive cost of common carrier transportation. The question before this office is the possible U. S. Government liability for the acts of the employee while so using his airplane.

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2. The Federal Tort Claims Act provides that the U. S. Government is liable for the negligence of its employees who, in the scope of their employment, cause personal injury or property damage to others. The question of primary import is whether the employee in question would be acting within the scope of his employment when: (a) he is traveling between his home in X and either Post A or B; and (b) he is traveling between Posts A and B.

3. The law of the state where the negligent or wrongful act or omission occurred has been generally applied in determining whether or not a given employee of the United States was acting within the scope of his employment. The difficulty in stating a set of controlling principles in this area is compounded by the fact that no single relevant factor is necessarily controlling. For these reasons the following statement of generalized principles should be carefully compared with the applicable state law.

4. An employee going to or returning from his daily work is generally not considered to be acting within the scope of his employment. The controlling factor seems to be whether the actions of the employee are primarily for the purpose of assisting the employer's work or for the personal convenience of the employee and are merely permitted by the employer in order to make the employment more desirable. If the latter, such actions are not within the scope of employment. The following comment and illustration are from the Restatement, Second, Agency §239, Comment b, and were cited with approval in United States v. Eleazer, 339 U.S. 903; and Paly v. United States, 221 F.2d 958:

The fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or if authorized, that its use is not within the scope of employment. The master may authorize the use of a particular instrumentality without assuming control over its use as a master. The fact that he does not own it or has not rented it upon such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use. If so, its control by the servant, although upon his master's business, is not within the scope of employment. (Emphasis added.)

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The master agrees with A, his servant, to pay for A's transportation upon public vehicles such as railway trains and street cars. As an alternative, A is permitted to use his own automobile for transportation, charging to the master the regular train fare. A is paid by the week, with indefinite hours of labor. In going to a place at which he is to perform work for the master, A drives his own car, carrying thereon necessary tools and materials belonging to the master. In the absence of evidence that A owes P any duty of obedience in the details of operating the automobile, such driving is not within the scope of employment.

5. Applying these general principles to the facts given above, it would appear that the subject employee would not be acting within the scope of his employment when using his privately owned airplane for transportation between his home in X and either of his posts of work, and, therefore, would not subject the Government to liability for his negligent acts. To further buttress this position it would probably be to the Government's advantage in amending the employee's contract to authorize the use of his airplane and reimbursement, to provide, in addition, language similar to the following:

Such authorization and reimbursement by the U. S. Government for travel between the employee's place of residence and post of work, are hereby acknowledged to be for the personal convenience of the employee for the purpose of assisting the employee to perform what is essentially his own job of getting to or from work.

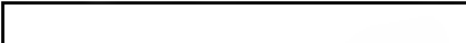
As to the situation where the employee travels by airplane between Posts A and B, it is the opinion of the undersigned from the authorities reviewed that such travel would be considered within the scope of his employment. The work has already begun at one post or the other and the employee is in the process of conducting the employer's business.

6. The Federal Employees' Compensation Act provides for compensation to the employee who is injured on duty, or in case of the employee's death, to his dependents, and is the exclusive remedy. It would appear that the test enunciated above for the Federal Tort Claims Act "scope of employment," would apply equally to the Federal Employees' Compensation Act "performance of duty." Therefore, there would be no recovery under the Federal Employees' Compensation Act for injury or death caused while traveling between the employee's residence in X and either post of work.

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7. It should be noted that damage to the employee's airplane would not be covered by the Federal Tort Claims Act, but rather his own insurer. It is possible that he would be charged higher premiums for "business use" or, more importantly, that damage to the airplane would not be covered because of an accident while traveling between Posts A and B because the employee did not have "business use" coverage. It should also be noted that reimbursement for the travel between his residence and post of work is taxable income to the employee.

SIGNED


Office of General Counsel

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OGC:RLB:mej

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